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March 8, 2007

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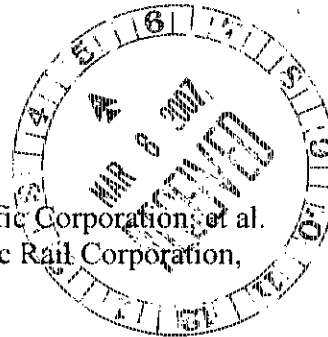
BY HAND-DELIVERY

Honorable Vernon A. Williams
Secretary
Surface Transportation Board
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Washington, DC 20423-0001

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Re: Finance Docket No. 32760, Union Pacific Corporation, et al.
– Control and Merger – Southern Pacific Rail Corporation,
et al.



Dear Secretary Williams:

Enclosed for filing in the above-captioned proceeding are the original and twenty-five (25) copies of BNSF Railway Company's Initial Response to the Petition of Union Pacific Railroad Company for Reformation of Agreement (BNSF-106).

I would appreciate it if you would date-stamp the enclosed extra copy and return it to the messenger for our files. Please let me know if you have any questions. Thank you for your assistance.

Sincerely yours,

Adrian L. Steel, Jr.

Enclosures

cc: Parties Listed on Attachment A

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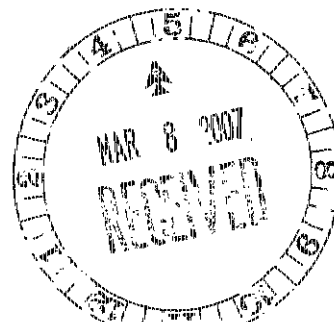
218772

BNSF-106

BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 32760

UNION PACIFIC CORPORATION, UNION PACIFIC RAILROAD COMPANY AND
MISSOURI PACIFIC RAILROAD COMPANY—CONTROL AND MERGER—
SOUTHERN PACIFIC RAIL CORPORATION, SOUTHERN PACIFIC TRANSPORTATION
COMPANY, ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, SPCSL CORP., AND
THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY



**INITIAL RESPONSE OF BNSF RAILWAY COMPANY TO
PETITION OF UNION PACIFIC RAILROAD COMPANY
FOR REFORMATION OF AGREEMENT**

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Attorneys for BNSF Railway Company

Dated: March 8, 2007

BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 32760

UNION PACIFIC CORPORATION, UNION PACIFIC RAILROAD COMPANY AND
MISSOURI PACIFIC RAILROAD COMPANY—CONTROL AND MERGER—
SOUTHERN PACIFIC RAIL CORPORATION, SOUTHERN PACIFIC TRANSPORTATION
COMPANY, ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, SPCSL CORP., AND
THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY

**INITIAL RESPONSE OF BNSF RAILWAY COMPANY TO
PETITION OF UNION PACIFIC RAILROAD COMPANY
FOR REFORMATION OF AGREEMENT**

Pursuant to 49 C.F.R. § 1104.13, BNSF Railway Company ("BNSF") hereby submits its Initial Response to the Petition of Union Pacific Railroad Company ("UP") for Reformation of Agreement. BNSF generally denies UP's allegations, further denies that UP is entitled to any relief, and requests that the Surface Transportation Board ("STB" or "Board") establish a procedural schedule in accordance with the terms that BNSF proposes below.

I. Summary Of UP's Petition

UP's Petition seeks to have the Board declare that an extensively-bargained contract between UP and BNSF, with periodic submissions to the Board during the process, contains a mutual mistake, and further seeks to have the Board reform that contract in a manner that violates the parties' clearly expressed intentions. The contract at issue is the Restated and Amended Settlement Agreement that UP and BNSF bargained for and agreed to, and then filed with this Board in March 2002, following submissions by the parties to the Board on July 2, 2001, July 25, 2001, and September 19, 2001. The Board imposed an earlier 1995 version of the

agreement with several supplements as a condition of its approval of the merger between UP and Southern Pacific ("SP"). Section 1(g) of that 1995 agreement granted trackage rights with certain traffic restrictions to BNSF over two UP-owned rail lines in northern California. One line, referred to as the "Cal-P" line, runs from Richmond-Stege (which is north of Oakland) to Sacramento-Haggin. The second UP-owned line runs from Sacramento-Haggin to Stockton. In 2000, UP and BNSF began the process of renegotiating the terms of the original settlement agreement to, *inter alia*, incorporate the various conditions imposed by the Board on the UP/SP merger and subsequent Board decisions interpreting and clarifying those conditions. Those negotiations lasted more than a year. As part of that process, UP drafted and proposed a new version of Section 1(g) that BNSF ultimately agreed to accept.

Despite the clear language of the 2002 version of Section 1(g), UP now asserts that the parties made a mutual mistake, and that they did not intend for the section to mean what it plainly says. Rather, UP claims that the parties meant to reiterate the traffic restrictions that the original version of Section 1(g) had imposed but which the revised Section 1(g) unambiguously discarded. As a remedy, UP requests that the Board take the extraordinary step of reforming the settlement agreement in a manner that would set forth new traffic restrictions in accordance with neither the original nor the revised versions of Section 1(g).

II. BNSF's Position

While a complete exposition of BNSF's response to UP's Petition can be made only after BNSF has had a fair and reasonable opportunity to investigate and analyze the relevant facts and law, BNSF is able at this point to express its opposition to UP's Petition on several grounds, including:

- No mutual mistake exists because such a mistake can only exist “[w]here a writing . . . in whole or in part fails to express the agreement because of a mistake of both parties as to the contents or effect of the writing” Restatement (Second) of Contracts, § 155. By contrast, during the parties’ negotiations, both UP and BNSF understood the meaning and effect of the clear, unambiguous language of the revised version of Section 1(g).
- UP can hardly claim that the parties together made a mutual mistake, given that UP *itself* conceived of and drafted the revised version of Section 1(g), which it then forwarded to BNSF for acceptance. In this regard, the parties agreed during their negotiations that the provisions of the original Section 1(g), particularly the traffic restrictions, were ambiguous and unclear and in need of clarification, and it was UP that offered to draft a revised Section 1(g). It is thus disingenuous for UP to claim now that it did not understand the meaning or import of its own proposal.
- If, however, UP did make a mistake itself, then there would still not be a mutual mistake. Rather, comment b to § 155 of the Restatement (Second) of Contracts would govern: “If one party sends to the other an offer which, because of a mistake, does not reflect the offeror’s intention, the rule stated in this Section [governing mutual mistake] does not apply” That is, no mutual mistake exists when UP alone is responsible for making an offer that BNSF then in good faith accepted.
- The revised version of Section 1(g) was simply one facet of a long and involved series of negotiations that by UP’s own admission involved resolving dozens of issues emerging from the actual implementation of the original settlement agreement and the UP/SP merger conditions by BNSF, including a number of Board-clarifying decisions in this and related proceedings before the board (including the Houston-Gulf Coast oversight

proceeding in Finance Docket No. 32760 (Sub-No. 26)) over a multi-year period. BNSF and UP each traded rights, both in renegotiating the settlement agreement generally, and in renegotiating Section 1(g) in particular. In this context, it is not credible for UP to claim that the language in the revised version of Section 1(g) was a mistake.

- Moreover, as BNSF's evidence will show when submitted, UP had numerous opportunities in its exchange of drafts with BNSF and in its submissions to the Board to identify the purported "mistake", and it failed repeatedly to do so. Indeed, the parties proposed and negotiated several further revisions to Section 1(g) itself, and at no time did UP assert that a "mistake" had been made.
- Given that the parties chose to revise Section 1(g) by using language that reallocated rights between UP and BNSF, and given that this reallocation took place in the context of a much broader series of trades, reforming the language along the lines that UP suggests would unfairly disadvantage BNSF by upsetting the balance of the larger, brokered agreement. It also raises the unfortunate issue that perhaps UP over time will uncover what it believes to be other "mistakes", which will lead to uncertainty for shippers and BNSF as to what UP/SP merger settlement conditions mean.
- The competitive elements of the settlement agreement aim to place BNSF in the shoes of the former SP. Prior to the merger, SP had the ability to route intermodal traffic on the subject rail lines in a similar fashion to how BNSF currently routes the intermodal traffic which UP has challenged. Therefore, it was reasonable at the time of the 2002 agreement and is reasonable today for BNSF to use the lines for such routings.

- The reformed language that UP requests the Board to impose would *not* re-establish the terms of the original Section 1(g), but rather would give the section a new meaning that neither party intended at the time of their negotiations.
- During the years that the parties uneventfully abided by the terms of the current version of Section 1(g), UP had full knowledge of every train that BNSF ran on UP's lines. In particular, BNSF's extended movement of intermodal trains over the lines without objection from UP (430 such trains by UP's count in 2005 alone) gave UP all the information it needed to infer that it had a different understanding of Section 1(g)'s restrictions than did BNSF. The fact that UP did not object demonstrates that it held the same understanding as BNSF did as to the meaning of the revised version of Section 1(g). Indeed, such conduct, outside the context of litigation, is persuasive evidence of the parties' understanding of Section 1(g).
- Even if a mistake was made (and BNSF denies that such a mistake exists), by failing to object since, by UP's own admission, at least early 2005, UP sat on its rights for too long to protest now.
- Additionally, UP's belated discovery of the "mistake" coincided with an increase in the number of trains operated by the Capitol Corridor commuter service, and UP should not be permitted to divest BNSF of its mutually-agreed to right to use that line pursuant to the revised Section 1(g) in order to deal with that increase in commuter trains and/or to avoid making necessary capacity improvements.
- Though UP requests that the Board give its Petition expedited consideration because of alleged harm to UP and passenger traffic, UP admits in its Petition that it is effectively managing the traffic over the lines by running freight trains only at night and passenger

trains during the day. Therefore, UP has demonstrated that there is no emergency concerning rail capacity, and therefore that there is no need for expedited consideration of its Petition.

- UP seems to assume that California law would govern this dispute, but the 2002 settlement agreement does not contain a choice-of-law clause. Therefore, the parties and the Board would need determine in the course of this proceeding what state or federal law governs this dispute.
- There may be limitations on the scope of relief that the Board can grant, given that the STB traditionally has abstained from intervening in contractual disputes between private parties and given the presence of an arbitration clause in the settlement agreement.
- BNSF reserves the right to introduce other defenses at later points during this proceeding.

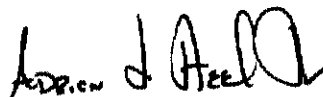
III. Proposed Procedural Schedule

UP has had months to prepare to file its pending Petition (indeed, the chart that appears at Page 45 of UP's Petition contains years' worth of data). Given the complexity of this case, BNSF will similarly require time to prepare its responsive case, including formal investigation and discovery. Allowing BNSF a reasonable opportunity to respond will not prejudice UP, given that (as described above) there is no need for expedited consideration of UP's Petition.

Therefore, BNSF proposes that the STB adopt the following procedural schedule:

- Upon the Board's order, 60 days for the parties to conduct discovery, in accordance with 49 C.F.R. § 1114;
- Upon the close of discovery, 45 days for BNSF to file its response to UP's Petition; and
- Upon BNSF's filing, 25 days for UP to file its rebuttal.

Respectfully submitted,



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March 8, 2007

CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of March 2007, a true and correct copy of the foregoing Initial Response of BNSF Railway Company to Petition of Union Pacific Railroad Company for Reformation of Agreement was served by first-class mail, postage prepaid, or by a more expeditious manner, on the parties listed on Exhibit A, attached hereto.



Attachment A

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